IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2321 OF 2003

Khadi & Village Industries Commission)
3, Irla Road, Vile Parle (W),)
Mumbai - 400 056.).. Petitioner

Versus

1. Sarayu Bhimrao Mohite,)
3/37, Anaji Master Chawl,)
K.G.Marg, Prabhadevi,)
Mumbai - 400 025.)

2. Central Government Industrial)
Tribunal No.2, 2nd Floor,)
Shram Raksha Bhawan,)
Shivsrushti Road,)
Opp. Priyadarshini, Sion,)
Mumbai - 400 022.).. Respondents

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Shri Vijay Kantharia and S.D.Bhosale for the Petitioner.

Shri Jayprakash Sawant for the respondent.
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CORAM: ABHAY S. OKA, J

DATED: 14TH JULY, 2006.

ORAL JUDGMENT:

1. The submissions of learned counsel appearing for the parties were heard on the last date.

2. By this petition under Article 226 of the

Constitution of India, the petitioner-Khadi & Village Industries Commission has challenged the impugned judgment and award passed by the learned Presiding Officer of the Central Government Industrial Tribunal No.2, Mumbai, in a reference made in exercise of powers conferred by clause (d) of Sub-section (1) of Sub-section (2A) of Section 10 of the Industrial Disputes Act, 1947 (hereinafter referred to as "the said Act of 1947").

3. With a view to appreciate the submissions made by learned counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief. The first respondent by letter dated 6th July, 1993 was called for typing test by the petitioner as her name was recommended by the Employment Exchange. The first respondent was called for typing test on 24th July, 1993 and after having passed in the said typing test, she was interviewed on 26th December, 1993 and on 7th January, 1994. She was selected and placed on the waiting list of selected candidates belonging to the general category for the post of Lower Division Clerk at Sr.No.35. According to the case of the first respondent, she was appointed as a Lower Division Clerk. She worked as such from 27th March, 1997 to 24th May, 1997. According to her, she

was again appointed from 1st July, 1997 to 31st December, 1997 for a period of six months and that she continuously worked for 184 days without any break during the said period on a consolidated salary of Rs.2,500/- per month. It was contended that the first respondent worked for 243 days as continuous worker and without giving one month's notice or without paying one month's wages and retrenchment compensation, her services were illegally terminated with effect from 1st January, 1998. On the basis of the notice of demand submitted by the first respondent, following reference was made to the Central Government Industrial Tribunal, Mumbai.

> "Whether the action of the management of Khadi & Village Industries Commission Mumbai by terminating the services of Ms. Sharyu Bhimrao Mohite w.e.f.1/1/98 is justified ? If not, to what relief the workman Ms.Sarayu B.Mohite is entitled ?

4. The petitioner contested the claim of the first respondent. The first contention was that the petitioner was not an "industry" within the meaning of Section 2(j) of the said Act of 1947 and therefore the Tribunal had no jurisdiction. It is contended that

though the respondent was on select list at Sr.No.35, the list lapsed after a period of two years i.e. with effect from 6th January, 1996. It is contended that the first respondent was appointed on contract basis and the first respondent has not actually worked for 243 days and in fact she has worked for 232 days. It was submitted that the provisions of Sections 25B and 25F will have no application.

5. By the impugned judgment and award, the learned Presiding Officer of the Tribunal held that the management of the petitioner was an industry. It was also held that the first respondent has proved that she worked for 243 days in a year. Therefore, the order of reinstatement with 50% backwages was passed by the learned Presiding Officer.

6. Shri Kantharia, learned counsel appearing for the petitioner pointed out that the petitioner has raised a contention that the petitioner is not an industry within the meaning of Section 2(j) of the Act of 1947. He however fairly stated that considering the legal position, it will be difficult to substantiate the said contention. He submitted that it is true that the name of the first respondent was included in the select list. However, he pointed out

that the select list has lapsed after a period of two years. He submitted that the case of the first respondent was not covered by Section 2(oo) of the said Act of 1947 in view of the clause (bb) thereof. He submitted that the finding of the Tribunal that the first respondent worked for 243 days was recorded by completely ignoring the provisions of section 2(oo)(bb) of the said Act of 1947. Without prejudice to his contention that the case will fall in clause (bb) of Section 2(oo) of the said Act of 1947, he submitted that the Sundays and holidays could not have been included while computing the days for which the first respondent actually worked. He placed reliance on the decision of the learned Single Judge of Rajasthan High Court in the case of **Bajrang Lal v. Assistant Engineer, P.W.D., Sub-Division Sikar and Ors.,** reported in 1993 IICLR 205. He also placed reliance on the decision of the Apex Court in the case of **Uptron India Ltd. v. Shammi Bhan & Anr.,** reported in (1998) 6 SCC 538. He submitted that even according to the case of the first respondent, she was employed for a fixed term of contract for a period of six months and therefore, the case of the first respondent was not covered by Section 2(oo) of the said Act of 1947. He also placed reliance on the decision of the Apex Court in the case of **Harmohinder Singh Vs.**

Kharga Canteen, Ambala Cantt., reported in 2001 II CLR 927 in that behalf. He, therefore, submitted that the impugned judgment and award was required to be quashed and set aside. Shri Kantharia also submitted that the order passed by the Tribunal for payment of 50% backwages was illegal as the burden was on the first respondent to prove that she was not gainfully employed after her alleged termination.

7. Shri Sawant, learned counsel appearing for the first respondent submitted that the impugned judgment and award is legal and proper. He submitted that the finding recorded by the Tribunal is that the first respondent was thrown out of the employment though the work existed and other hands were engaged in her place to do her work. He submitted that while computing the total number of days for which the first respondent worked, the 12 weekly off i.e. Sundays and holidays will have to be computed. He placed reliance on the various decisions in support of his contention. He placed reliance on the decision of the Apex Court in the case of **The Workmen of American Express International Banking Corporation v. The Management of American Express International Banking Corporation,** reported in 1985 II CLR 269 and submitted that the view taken by the Tribunal that the first respondent

worked for more than 240 days is the correct view. He placed reliance on another decision reported in 1956 (74) FLR 2321 **(Goodyear India Ltd. v. Vijaykumar)** and submitted that it cannot be said that the termination of the service of the Respondent was as a result of expiry of a contractual term in the order of appointment. He submitted that though all the findings are in favour of the first respondent, the Tribunal has not specifically recorded in the operative part of the order that the first respondent is entitled to continuity in the service. He submitted that if the order of reinstatement is confirmed and continuity in the service is granted, the first respondent may not insist for execution of the direction to pay 50% backwages. He submitted that otherwise there is no reason to disturb the award made with regard to the payment of backwages.

8. I have considered the submissions. It will be necessary to refer to the findings recorded by the learned Presiding Officer of the Tribunal in the impugned judgment and award. It must be stated that it is not at all reflected from the impugned judgment and award that the submission which is made in this Court regarding non-applicability of Section 2(oo) of the said Act of 1947 in view of clause (bb) thereof

was specifically made before the Tribunal. The first submission which is made was that the Tribunal had no jurisdiction as the petitioner cannot be termed as an "industry". The second contention was that the respondent has not worked continuously for a period of 240 days.

9. In paragraph 12 of the judgment and award, the learned Presiding Officer has observed that the evidence on record shows that the work which was being done by the first respondent was of a permanent nature and she was already included on the waiting list of the selected candidates. The learned Presiding Officer of the Tribunal has disbelieved the case made out by the petitioner on the basis of the evidence on record which indicates that the first respondent was engaged in the work of permanent nature. The learned Presiding Officer also referred to the fact that the entry of the Respondent was not from back door. He recorded a finding that out of the select list, 28 persons were appointed, but due to ban on appointment other persons were not engaged. The learned Member of the Tribunal did not accept the case of the Petitioner that though the Respondent was already on select list her appointment was purely on contractual basis. Shri P.M.Kantharia, Asstt.Director of the Petitioner stated

in his evidence that there were vacancies of Lower Division Clerks and the ban on employment was imposed on 5th August 1999. It is very difficult to find fault with the finding of the Tribunal.

10. One Shri Dhamija, Assistant Director of the petitioner admitted during the course of his cross examination that the respondent was not given wages of weekly off and she was also not paid wages of the holidays during daily wages period. Considering this admission of the witness examined by the petitioner, the Tribunal held that the workman was not paid wages of 12 holidays. It is also observed that this factual position is not disputed by the petitioner. That is how the learned Presiding Officer of the Tribunal came to the conclusion that the respondent completed 244 days. It is not possible to interfere with the said finding of fact. Therefore, the order of reinstatement was passed without complying with Section 25F of the said Act of 1947.

11. So far as the backwages are concerned, the only reason given by the Presiding Officer is in paragraph 13. My attention was invited to the evidence of the respondent. In the examination-in-chief of the first respondent which is

recorded on 1st August, 2001, she has not stated that after 1st January, 1998 she was not gainfully employed or that she had no source of income. Thus, no evidence has been led by the first respondent that she had no source of livelihood after her services were terminated. This important aspect has not been considered by the Presiding Officer. In fact, in view of the nature of the evidence led by the respondent this was a case where backwages should have been denied to the first respondent.

12. The grievance made by learned counsel appearing for the respondent is that the award may be modified directing that the first respondent shall be reinstated in service with continuity in the service. The relief of continuity in service has not been granted by the impugned judgment and award. The first respondent has not chosen to file any writ petition for challenging that part of the award. Hence, such a prayer cannot be acceded to.

13. Hence, the petition must succeed in part and I pass the following order.

(i) The Petition partly succeeds. The part of the impugned award directing

the petitioner to pay 50% of the backwages to the respondent is quashed and set aside.

(ii) Rest of the award is maintained.

(iii) Rule is made partly absolute with no order as to costs.

Judge.